INDEX

	Page
Statement	1
Argument	3
Conclusion	10
Appendix	11

CITATIONS

Cases:	
American Communications Ass'n v. *Douds*, 339 U.S. 382	8
Boutilier v. *Immigration & Naturalization Service*, 387 U.S. 118	8
Breard v. *Alexandria*, 341 U.S. 622	5, 6, 7
Camara v. *Municipal Court*, 387 U.S. 523	6
Cameron v. *Johnson*, 390 U.S. 611	6
Chaplinsky v. *New Hampshire*, 315 U.S. 568	6
Cox v. *New Hampshire*, 312 U.S. 569	6
Currin v. *Wallace*, 306 U.S. 1	9
Cusack Co. v. *City of Chicago*, 242 U.S. 526	9
Feiner v. *New York*, 340 U.S. 315	6
Ginsburg v. *United States*, 383 U.S. 463	5, 8
Griswold v. *Connecticut*, 381 U.S. 479	6
Interstate Circuit, Inc. v. *Dallas*, 390 U.S. 676	8
Jamison v. *Texas*, 318 U.S. 413	5
Kovacs v. *Cooper*, 336 U.S. 77	6
Lamont v. *Postmaster General*, 381 U.S. 301	7
Martin v. *City of Struthers*, 319 U.S. 141	6, 7
Poulos v. *New Hampshire*, 345 U.S. 395	6
Roth v. *United States*, 354 U.S. 476	8
Saia v. *New York*, 334 U.S. 558	6
See v. *City of Seattle*, 387 U.S. 541	6
Speiser v. *Randall*, 357 U.S. 513	7
United States v. *Cardiff*, 344 U.S. 174	8
United States v. *Raines*, 362 U.S. 17	7
United States v. *Rock Royal Co-op.*, 307 U.S. 533	9
United Steelworkers v. *United States*, 361 U.S. 39	7
Valentine v. *Chrestensen*, 316 U.S. 52	5

361-250—69

Constitution and statutes:
Constitution of the United States:
Page
First Amendment 3, 4, 5, 7
Fifth Amendment 3
28 U.S.C. 1253 1
28 U.S.C. 2284 1
Public Law 90–206 (81 Stat. 645), codified as 39 U.S.C. (Supp. IV) 4009 ..... 2, 3, 4, 5, 7, 8, 9, 10, 11
Miscellaneous:
113 Cong. Rec. 28659–28661 4
H.R. 7977 4
H. Rep. No. 722, 90th Cong., 1st Sess 4
S. Rep. No. 801, 90th Cong., 1st Sess 2

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 399

DANIEL ROWAN, D.B.A. AMERICAN BOOK SERVICE, ET AL., APPELLANTS

v.

UNITED STATES POST OFFICE DEPARTMENT, ET AL.

MOTION TO AFFIRM

Pursuant to Rule 16(1)(c) of the Rules of this Court, the Solicitor General, on behalf of appellees, moves that the judgment of the district court be affirmed.

STATEMENT

Appellants have taken this direct appeal, under 28 U.S.C. 1253, from an order of a three-judge district court, convened pursuant to 28 U.S.C. 2284, denying injunctive relief and granting appellees' motion to dismiss the complaint (J.S. 10–11). Appellants herein are, *inter alia*, book publishers and distributors, operators of mail order houses, and mailing-list brokers. All are connected, in one manner or another, with commercial solicitation through use of the mails.

On December 16, 1967, heeding the "[h]undreds of thousands of complaints [which] are received annually by the Post Office Department and individual Members of Congress about the repeated receipt of unsolicited mail which is obscene, obnoxious, or otherwise offensive to the recipient,"[1] Congress enacted Public Law 90–206 (81 Stat. 645), which was subsequently codified as 39 U.S.C. (Supp. IV) 4009. Under Section 4009, effective as of April 15, 1968, any private citizen who receives any "pandering advertisements" offering for sale any materials which he "in his sole discretion believes to be erotically arousing or sexually provocative," may request the Postmaster General to direct the mailer to refrain from further mailings of such materials.[2] Upon receipt of such a request, the Postmaster General is authorized to issue an order prohibiting future mailings of such materials to the designated addressee. Prior to the enforcement of any such order, the mailer has a right to an administrative and a judicial hearing.

During the period following April 15, 1968, various addressees who had received what they considered to be such pandering advertisements of obscene materials from one or another of appellants, notified the Postmaster General of that fact and requested the issuance of the prohibitory orders authorized by Section 4009. Such orders were issued and many are currently outstanding against appellants.

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[1] S. Rep. No. 801, 90th Cong., 1st Sess., p. 37.

[2] The full text of 39 U.S.C. 4009 is set out in the Appendix, *infra*, pp. 11–13.

By complaint filed September 18, 1968, appellants collectively sought to enjoin the Postmaster General from enforcing Section 4009 and to have that provision declared unconstitutional on the grounds, *inter alia*, that insofar as it inhibits the circulation of their advertisements it violates their rights to freedom of speech and press protected by the First Amendment. Appellants also claimed various deprivations of their right to due process in violation of the Fifth Amendment.

The three-judge district court, with one judge concurring specially but without dissent, dismissed the complaint. It concluded, in effect, that Section 4009 merely authorizes the Postmaster General to prohibit mailings of unwanted materials to unwilling recipients, not to the community in general (J.S. App. 6). In the court's view, appellants have no constitutionally protected right to impose their materials on persons who have affirmatively indicated that they desire not to receive them.

ARGUMENT

The district court correctly concluded that 39 U.S.C. 4009 violates none of appellants' constitutional rights. The points raised by appellants are not sufficiently substantial to warrant plenary consideration by this Court. Accordingly, it would be appropriate for the Court to affirm the judgment below summarily.

1. Section 4009 provides a procedure whereby an individual addressee may decide, for himself and his family, to keep from his home pandering advertisements which he considers to be personally offensive and obscene. The addressee may then enlist the aid

of the Post Office Department and the courts in enforcing that determination. Thus, the statute does not invest the Postmaster General with the functions of a public censor; instead, it simply allows him to carry out the wishes of private citizens who do not wish to receive certain types of mail.[3] Indeed, no other feasible way of accomplishing this objective is readily apparent.

The remedy thus accorded private individuals is based upon a simple proposition: the right to speak to the community at large may be made to yield to a citizen's countervailing right to privacy in his own home. Resort to this Court's First Amendment teachings reveals that this proposition is plainly valid.

First, we emphasize the fact that Section 4009 does not purport to authorize any curtailment whatever of the flow of books, pamphlets, pictures or other forms of traditionally protected written materials. The statute authorizes the Postmaster General, upon request, to prohibit future mailings of *pandering advertisements only* (J.S. App. 9); 39 U.S.C. 4009(a). In these circumstances, it is pertinent to recall that, whatever may be the limitations on Congress' right to control the free flow of ideas, the "Constitution imposes no

[3] Under the original, draft version of Section 4009 (H.R. 7977), the discretion to decide which advertisements were "erotically arousing or sexually provocative" (and hence non-mailable to designated addressees) would have been invested, not in the individual addressee involved, but in the Postmaster General. See H. Rep. No. 722, 90th Cong., 1st Sess., p. 125. Substitution of the present statutory scheme was designed to remove any constitutional objection on grounds of censorship by the Postmaster General. 113 Cong.. Rec. 28659–28661.

such [First Amendment] restraint on government as respects purely commercial advertising." *Valentine* v. *Chrestensen*, 316 U.S. 52.[4] Compare *Jamison* v. *Texas*, 318 U.S. 413, 417.[5]

But even assuming *arguendo* that appellants' materials enjoy the same range of First Amendment privileges accorded to other forms of expression, that fact would not render Section 4009 unconstitutional. Appellants' right to disseminate their materials would

[4] As summarized in *Breard* v. *Alexandria*, 341 U.S. 622, 627: "[E]xigencies of trade are not ordinarily expected to have a higher rating constitutionally than the tranquility of the fireside * * *." And see *Ginzburg* v. *United States* 383 U.S. 463, 474, n. 17, stating: "Material sold solely to produce sexual arousal, *like commercial advertising*, does not escape regulation because it has been dressed up as speech * * *" (emphasis added).

[5] Application of the principles of *Valentine* seems especially justified in the instant case. Section 4009 has the effect of curbing the flow of mail only to those who already have shown that they do not wish to receive it. It scarcely can be claimed that the right to continue to send mail to persons who do not wish to receive it is one of value requiring protection by this Court. Yet, that is the essence of the constitutional right appellants seek to claim here—the right to be wholly unfettered in sending, through the mails, commercial advertisements to those who have indicated a specific aversion to receiving such materials from them. Nothing in this Court's First Amendment precedents, nor in the history of that constitutional provision, recognizes such a right. Nor, apparently, are appellants actually concerned with protecting that right. While framing their papers below in terms of the right of free speech, appellants' supporting affidavits reveal that actually it is not this right which they seek to vindicate. Rather, their principal objective is simply to avoid the costs, imposed as a result of compliance with prohibitory orders issued pursuant to Section 4009, of deleting the names of complaining addressees from their mailing lists (see J.S. App. 21). Thus, appellants invoke the First Amendment to help them keep down the costs of doing business as publishers, distributors, and brokers.

in no event be absolute, but would have to be exercised so as not to interfere with the countervailing rights of others. See, *e.g.*, *Cameron* v. *Johnson*, 390 U.S. 611; *Poulos* v. *New Hampshire*, 345 U.S. 395; *Feiner* v. *New York*, 340 U.S. 315; *Chaplinsky* v. *New Hampshire*, 315 U.S. 568; *Cox* v. *New Hampshire*, 312 U.S. 569. Indeed, as this Court has said, where the countervailing right involved is the paramount right to the privacy and enjoyment of one's own home, the right to speak must yield. *Breard* v. *Alexandria*, 341 U.S. 622; *Kovacs* v. *Cooper*, 336 U.S. 77; *Saia* v. *New York*, 334 U.S. 558.[6] Cf. *Griswold* v. *Connecticut*, 381 U.S. 479; *Camara* v. *Municipal Court*, 387 U.S. 523; *See* v. *City of Seattle*, 387 U.S. 541.

To be sure, this Court has questioned the community's right to decide beforehand just which speech will or will not be acceptable to all of its inhabitants within the privacy of their own homes. To paraphrase Mr. Justice Black, in such situations involving prior restraint government should not offer to protect the interests of all of their citizens, whether particular citizens want that protection or not. *Martin* v. *City of Struthers*, 319 U.S. 141, 143. At the same time, however, this Court has plainly recognized that, even where the effect is to curtail speech, it is perfectly

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[6] As observed in *Kovacs* v. *Cooper*, *supra*, 336 U.S. at 88, relied upon by the court below:

"The preferred position of freedom of speech in a society that cherishes liberty for all does not require legislators to be unsensible to claims by citizens to comfort and convenience. *To enforce freedom of speech in disregard of the rights of others would be harsh and arbitrary in itself* * * *" (emphasis added).

permissible for each resident to make that determination for himself. *Martin* v. *City of Struthers, supra,* 319 U.S. at 142, 147, 148; *Breard* v. *Alexandria, supra,* 341 U.S. at 632–633, 641–645; see *Lamont* v. *Postmaster General,* 381 U.S. 301, 310 (Brennan, J., concurring).[7] In *Lamont,* it should be noted, the Court was principally concerned with "a limitation on the unfettered exercise of the addressee's First Amendment rights" (*id.* at 305). Indeed, the Court there impliedly approved a Post Office regulation which, for First Amendment purposes, is identical to the statute here at issue (*id.* at 304, n. 2; 310). Appellants' extensive reliance on *Lamont* is thus misplaced.[8]

As the district court found, Section 4009 "is only an implementation of the right of an individual to choose what it is he desires to see and read within his own personal sensitivity and concept of privacy" (J.S. App. 7). Since the right to speak confers no right to intrude on an unwilling listener within the confines of his own residence, appellants cannot complain that Section 4009 has infringed that right.

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[7] Of course, once a resident has chosen to invoke his right to the privacy of his own home, the community is free to see to it that that choice is respected. *Martin* v. *City of Struthers, supra,* 319 U.S. at 148. Cf. *United States* v. *Raines,* 362 U.S. 17, 27; *United Steelworkers* v. *United States,* 361 U.S. 39, 43.

[8] Similarly, *Speiser* v. *Randall,* 357 U.S. 513, on which appellants also rely, does not support their position. There the burden was placed on individuals to come forward and take an oath to support their claim to certain tax exemptions, in circumstances where, the Court concluded, "the denial of a tax exemption for engaging in certain speech necessarily will have the effect of coercing the claimants to refrain from the proscribed speech" (*id.* at 519). No such situation exists under the statute here challenged.

2. The district court also properly concluded that Section 4009 deprived appellants of no other constitutional rights.

a. The statute authorizes any addressee to take steps to cut off the flow to his home of "pandering advertisements" which he, in his sole discretion, believes to be "erotically arousing or sexually provocative." Appellants contend that, as thus framed, Section 4009 is void for vagueness. This contention is untenable. Initially, there is nothing intrinsically vague about the foregoing phrases. Indeed, variations of these terms have long been used by the federal courts in obscenity litigation. See, *e.g., Ginzburg* v. *United States,* 383 U.S. 463, 467, 470; *Roth* v. *United States,* 354 U.S. 476, 490, 491.

In any event, appellants can hardly claim injury by reason of vagueness. A statute generally is considered fatally vague only where it exposes a potential actor to some risk or detriment for the performance of particular conduct, without giving fair warning of the nature of that conduct. *United States* v. *Cardiff,* 344 U.S. 174; *American Communications Ass'n* v. *Douds,* 339 U.S. 382.[9]

Appellants, however, run no risks of miscalculation here. See *Boutilier* v. *Immigration & Naturalization Service,* 387 U.S. 118, 123. Even after the entry of a prohibitory order, relating to one or more individual

[9] Of course the risk need not be penal in nature. In the freedom of speech area, for example, one who cannot understand in advance which types of expression have been curbed runs the risk of being unable to disseminate his ideas to the community at large. See, *e.g., Interstate Circuit, Inc.* v. *Dallas,* 390 U.S. 676, 684.

addressees, appellants' materials continue to enjoy free access to the remainder of the community. Nor is there any risk of punishment for unwittingly offending a particular addressee. One who has mailed objectionable materials is merely subject to an order to refrain from future mailings of similar matter to the same addressee. And even if the mailer continues to send such materials to that particular addressee, in direct violation of the Postmaster General's order, he is still subject to no sanctions until the Attorney General has first secured a compliance order from a district court. 39 U.S.C. 4009(d). Only at that point does the mailer—already keenly aware of which types of materials, sent to which individuals, have been proscribed—become subject to penalty, *i.e.*, contempt for continued disregard of the order. 39 U.S.C. 4009(e).

b. Appellants' other contentions are equally devoid of merit. There is no problem here of an unlawful delegation of the congressional power to legislate; for it is Congress which has determined which types of mail matter may be barred from the home, *i.e.*, pandering advertisements which the addressee finds erotic or sexually arousing. The addressee's authority to determine when such materials have been received is merely an exercise of discretion under existing law. See *United States* v. *Rock Royal Co-op.*, 307 U.S. 533, 577; *Currin* v. *Wallace*, 306 U.S. 1, 15–16; *Cusack Co.* v. *City of Chicago*, 242 U.S. 526, 529–531. Indeed, since Section 4009 seeks to protect the addressee's right of privacy, the addressee is best suited to decide, at least in the first instance, the situations in which he will invoke the statute.

Finally, appellants have been deprived of no right to due process of the law. Before they can be punished for violating the Postmaster General's prohibitory order they are accorded the right to an administrative hearing, at which point they may establish that they have not violated his order. 39 U.S.C. 4009(d). In addition to this hearing, we view the statute as granting appellants an additional opportunity to present their views during the compliance proceedings before the district court (*ibid.*). This is followed by still a third opportunity at any contempt proceedings which might ensue, at which a mailer may seek to justify his actions. These guaranteed opportunities for a judicial determination of the matter are plainly sufficient to protect appellants' rights and guard against any denial of due process.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted.

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AUGUST 1969.

APPENDIX

39 U.S.C. (Supp. IV) 4009:

§ 4009. Prohibition of pandering advertisements in the mails.

(a) Whoever for himself, or by his agents or assigns, mails or causes to be mailed any pandering advertisement which offers for sale matter which the addressee in his sole discretion believes to be erotically arousing or sexually provocative shall be subject to an order of the Postmaster General to refrain from further mailings of such materials to designated addressees thereof.

(b) Upon receipt of notice from an addressee that he has received such mail matter, determined by the addressee in his sole discretion to be of the character described in subsection (a) of this section, the Postmaster General shall issue an order, if requested by the addressee, to the sender thereof, directing the sender and his agents or assigns to refrain from further mailings to the named addressees.

(c) The order of the Postmaster General shall expressly prohibit the sender and his agents or assigns from making any further mailings to the designated addressees, effective on the thirtieth calendar day after receipt of the order. The order of the Postmaster General shall also direct the sender and his agents or assigns to delete immediately the names of the designated addressees from all mailing lists owned or controlled by the sender or his agents

or assigns and, further, shall prohibit the sender and his agents or assigns from the sale, rental, exchange, or other transaction involving mailing lists bearing the names of the designated addressees.

(d) Whenever the Postmaster General believes that the sender or anyone acting on his behalf has violated or is violating the order given under this section, he shall serve upon the sender, by registered or certified mail, a complaint stating the reasons for his belief and request that any response thereto be filed in writing with the Postmaster General within fifteen days after the date of such service. If the Postmaster General, after appropriate hearing if requested by the sender, and without a hearing if such a hearing is not requested, thereafter determines that the order given has been or is being violated, he is authorized to request the Attorney General to make application, and the Attorney General is authorized to make application, to a district court of the United States for an order directing compliance with such notice.

(e) Any district court of the United States within the jurisdiction of which any mail matter shall have been sent or received in violation of the order provided for by this section shall have jurisdiction, upon application by the Attorney General, to issue an order commanding compliance with such notice. Failure to observe such order may be punished by the court as contempt thereof.

(f) Receipt of mail matter thirty days or more after the effective date of the order provided for by this section shall create a rebut-

table presumption that such mail was sent after such effective date.

(g) Upon request of any addressee, the order of the Postmaster General shall include the names of any of his minor children who have not attained their nineteenth birthday, and who reside with the addressee.

(h) The provisions of subchapter II of chapter 5 (relating to administrative procedure) and chapter 7 (relating to judicial review) of part I of title 5, United States Code, shall not apply to any provisions of this section.

(i) For the purposes of this section—

(1) mail matter, directed to a specific address covered in the order of the Postmaster General, without designation of a specific addressee thereon, shall be considered as addressed to the person named in the Postmaster General's order; and

(2) the term "children" includes natural children, stepchildren, adopted children, and children who are wards of or in custody of the addressee or who are living with such addressee in a regular parent-child relationship.

U.S. GOVERNMENT PRINTING OFFICE: 1969